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22 UNITED STATES DISTRICT COURT
23 FOR THE NORTHERN DISTRICT OF CALIFORNIA
24 SAN FRANCISCO DIVISION

25 FEDERAL TRADE COMMISSION,

26 Case No. 3:23-cv-02880-JSC

27 Plaintiff,

28 v.
**DEFENDANT MICROSOFT
CORPORATION'S STATEMENT IN
RESPONSE TO PLAINTIFF FEDERAL
TRADE COMMISSION'S
ADMINISTRATIVE MOTIONS TO
CONSIDER WHETHER ANOTHER
PARTY'S MATERIAL SHOULD BE
SEALED (CIVIL L.R. 79-5(f)(3)) [ECF NOS.
131 AND 132]**

MICROSOFT CORPORATION and
ACTIVISION BLIZZARD, INC.,

Defendants.

Dept.: Courtroom 8—19th Floor
Judge: Honorable Jacqueline S. Corley

Pursuant to Civil Local Rule 79-5(f)(3), Defendant Microsoft Corporation (“Microsoft”) respectfully requests that the Court maintain under seal the confidential information identified below, which was provisionally filed under seal pursuant to Plaintiff Federal Trade Commission’s (hereafter, “FTC” or “Plaintiff”) Administrative Motion to Consider Whether Another Party’s Material Should be Sealed (“Administrative Motion”) (ECF No. 132). Below, Microsoft has identified highly confidential material found in the FTC’s Reply to Defendants’ Opposition to Preliminary Injunction Motion (ECF No. 131) (“Plaintiff’s Reply”), along with the specific bases for sealing required under Local Rule 79-5.

The proposed sealing in the chart below reflects Microsoft’s good-faith efforts to narrowly seek sealing of only that information which is competitively sensitive and contained in internal documents, the public disclosure of which would cause injury to Microsoft that cannot be avoided through any more restrictive alternative means. Indeed, Microsoft has determined that some of the material identified in Plaintiff’s Administrative Motion does not warrant sealing and, therefore, does not seek to maintain it under seal.

Document	Portion to Be Filed Under Seal	Designating Party	Basis for Sealing Request¹
Plaintiff’s Reply	Page 1, Portions of Lines 17–25	Microsoft	This portion contains non-public and highly sensitive information including, but not limited to, internal decision-making processes, investment decisions, market share analyses, assessment of the competitive landscape, business partnerships, and revenue figures and projections, which could be used to injure Microsoft if made publicly available.
Plaintiff’s Reply	Page 3, Portions of Lines 14-23	Microsoft	This portion contains non-public and highly sensitive information including, but not limited to, internal decision-making processes, investment decisions, market share analyses, and assessment of the competitive landscape, which could be used to injure Microsoft if made publicly available.

¹ Legitimate private interests warrant sealing of Microsoft information in this chart, and the unsealing of the information would result in injury to Microsoft that cannot be avoided through any less restrictive alternatives.

Document	Portion to Be Filed Under Seal	Designating Party	Basis for Sealing Request¹
Plaintiff's Reply	Page 4, Portions of Lines 10-13	Microsoft	This portion contains non-public and highly sensitive information including, but not limited to, internal decision-making processes, investment decisions, strategic evaluation of forward-looking opportunities, market share analyses, and assessment of the competitive landscape, which could be used to injure Microsoft if made publicly available.
Plaintiff's Reply	Page 4, Portions of Lines 15-16	Microsoft	This portion contains non-public and highly sensitive information including, but not limited to, internal decision-making processes, investment decisions, strategic evaluation of forward-looking opportunities, market share analyses, and assessment of the competitive landscape, which could be used to injure Microsoft if made publicly available.
Plaintiff's Reply	Page 5, Portions of Lines 10-19	Microsoft	This portion contains non-public and highly sensitive information including, but not limited to, internal decision-making processes, investment decisions, strategic evaluation of forward-looking opportunities, market share analyses, and assessment of the competitive landscape, which could be used to injure Microsoft if made publicly available.
Plaintiff's Reply	Page 5, Portions of Lines 22-25	Microsoft	This portion contains non-public and highly sensitive information including, but not limited to, internal decision-making processes, investment decisions, strategic evaluation of forward-looking opportunities, market share analyses, business partnerships, terms of existing confidential agreements, and assessment of the competitive landscape, which could be used to injure Microsoft if made publicly available.

Document	Portion to Be Filed Under Seal	Designating Party	Basis for Sealing Request¹
Plaintiff's Reply	Page 6, Portions of Line 5-11	Microsoft	This portion contains non-public and highly sensitive information including, but not limited to, internal decision-making processes, investment decisions, strategic evaluation of forward-looking opportunities, market share analyses, and assessment of the competitive landscape, which could be used to injure Microsoft if made publicly available.
Plaintiff's Reply	Page 6, Portions of Lines 21-25	Microsoft	This portion contains non-public and highly sensitive information including, but not limited to, internal decision-making processes, investment decisions, strategic evaluation of forward-looking opportunities, market share analyses, and assessment of the competitive landscape, which could be used to injure Microsoft if made publicly available.
Plaintiff's Reply	Page 6, Portions of Lines 23-27	Microsoft	This portion contains non-public and highly sensitive information including, but not limited to, internal decision-making processes, investment decisions, and strategic evaluation of forward-looking opportunities, which could be used to injure Microsoft if made publicly available.
Plaintiff's Reply	Page 8, Portions of Lines 3-19	Microsoft	This portion contains non-public and highly sensitive information including, but not limited to, internal decision-making processes, investment decisions, strategic evaluation of forward-looking opportunities, market share analyses, assessment of the competitive landscape, business partnerships, and revenue figures and projections, which could be used to injure Microsoft if made publicly available.

Document	Portion to Be Filed Under Seal	Designating Party	Basis for Sealing Request¹
Plaintiff's Reply	Page 9, Portions of Lines 27-28, Page 10, Portions of Lines 1-4	Microsoft	This portion contains non-public and highly sensitive information including, but not limited to, internal decision-making processes, investment decisions, strategic evaluation of forward-looking opportunities, market share analyses, assessment of the competitive landscape, business partnerships, and revenue figures and projections, which could be used to injure Microsoft if made publicly available.
Plaintiff's Reply	Page 10, Portions of Lines 6-14	Microsoft	This portion contains non-public and highly sensitive information including, but not limited to, internal decision-making processes, investment decisions, strategic evaluation of forward-looking opportunities, business partnerships, terms of existing confidential agreements, and revenue figures and projections, which could be used to injure Microsoft if made publicly available.
Plaintiff's Reply	Page 10, Portions of Lines 20-27	Microsoft	This portion contains non-public and highly sensitive information including, but not limited to, internal decision-making processes, investment decisions, strategic evaluation of forward-looking opportunities, market share analyses, and assessment of the competitive landscape, which could be used to injure Microsoft if made publicly available.
Plaintiff's Reply	Page 11, Portions of Lines 13-14	Microsoft	This portion contains non-public and highly sensitive information including, but not limited to, internal decision-making processes, investment decisions, and strategic evaluation of forward-looking opportunities, which could be used to injure Microsoft if made publicly available.

Document	Portion to Be Filed Under Seal	Designating Party	Basis for Sealing Request¹
Plaintiff's Reply	Page 11, Portions of Lines 19-27	Microsoft	This portion contains non-public and highly sensitive information including, but not limited to, internal decision-making processes, investment decisions, strategic evaluation of forward-looking opportunities, market share analyses, assessment of the competitive landscape, business partnerships, and terms of existing confidential agreements, which could be used to injure Microsoft if made publicly available.
Plaintiff's Reply	Page 12, Portions of Lines 5-6	Microsoft	This portion contains non-public and highly sensitive information including, but not limited to, internal decision-making processes, investment decisions, and assessment of the competitive landscape, which could be used to injure Microsoft if made publicly available.
Plaintiff's Reply	Page 13, Portions of Lines 22-23	Microsoft	This portion contains non-public and highly sensitive information including, but not limited to, internal decision-making processes, investment decisions, business partnerships, and terms of existing confidential agreements, which could be used to injure Microsoft if made publicly available.

ARGUMENT

I. Sealing of Plaintiff's Reply Is Warranted Under Ninth Circuit Precedent as They Contain Microsoft's Confidential Business Information

Microsoft seeks to maintain under seal portions of Plaintiff's Reply, as they contain Microsoft's non-public and highly sensitive information from documents obtained during the course of the FTC's investigation and during litigation discovery. In the Ninth Circuit, "[p]arties seeking to seal judicial records relating to motions that are 'more than tangentially related to the underlying cause of action,' bear the burden of overcoming the presumption with 'compelling reasons supported by specific factual findings that outweigh the general history of access and the public policies favoring disclosure.'" *Lenovo*

1 (*United States*) Inc. v. IPCOM GmbH & Co., KG, 2022 WL 2313948, at *1 (N.D. Cal. Jun. 28, 2022);
 2 see also *Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006) (“[T]he court
 3 must ‘conscientiously [] balance the competing interests’ of the public and the party who seeks to keep
 4 certain judicial records secret.”). Courts in this Circuit regularly find that sealing is warranted where
 5 the records or information that are sought to be sealed could be used “as sources of business information
 6 that might harm a litigant’s competitive standing.” *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 598
 7 (1978); see also *In re Elec. Arts, Inc.*, 298 F. App’x 568, 569 (9th Cir. 2008) (same); *Velasco v. Chrysler*
 8 *Grp. LLC*, No. CV 13-08080 DDP (VBK), 2017 WL 445241, at *2 (C.D. Cal. Jan. 30, 2017) (stating
 9 that “district courts in this Circuit have sealed records containing ‘information about proprietary business
 10 operations, a company’s business mode or agreements with clients,’ [and] ‘internal policies and
 11 strategies’”) (internal citations omitted).

12 “The Ninth Circuit has explained that ‘in general, compelling reasons sufficient to outweigh the
 13 public’s interest in disclosure and justify sealing court records exist when such court files might have
 14 become a vehicle for improper purposes, such as the use of records to . . . release trade secrets.’” *Velasco*,
 15 2017 WL 445241, at *2 (quoting *Elec. Arts*, 298 F. App’x at 569); see also *Elec. Arts*, 298 F. App’x at
 16 569 (“A ‘trade secret may consist of any formula, pattern, device or compilation of information which
 17 is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors
 18 who do not know or use it.’”) (citation omitted). A court has “broad latitude” to grant protective orders
 19 to prevent disclosure of “many types of information, including, but not limited to, trade secrets or other
 20 confidential research, development, or commercial information.” *Phillips ex rel. Estates of Byrd v. Gen.*
 21 *Motors Corp.*, 307 F.3d 1206, 1211 (9th Cir. 2002).

22 In determining whether a document should be filed under seal, courts consider, among other
 23 things, the measures taken to guard the information’s secrecy and the value of the information to the
 24 business or its competitors. E.g., *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206,
 25 1212 (9th Cir. 2002). Here, Microsoft seeks to maintain under seal narrowly tailored excerpts of
 26 Plaintiff’s Reply that reference and reflect, among other things, confidential, proprietary information
 27 relating to Microsoft’s internal decision-making processes, investment decisions, strategic evaluation of
 28 forward-looking opportunities, market share analyses, assessment of the competitive landscape, business

1 partnerships, terms of existing confidential agreements, revenue figures and projections, and internal
 2 presentations discussing business strategy. The disclosure of this information could be used to injure
 3 Microsoft if made publicly available.

4 **II. Sealing of Plaintiff's Reply Is Necessary to Protect Microsoft's Confidential and
 5 Proprietary Business Information**

6 Microsoft supports maintaining under seal narrowly tailored excerpts of Plaintiff's Reply, which
 7 contain Microsoft's non-public and highly sensitive information from documents obtained during the
 8 course of the FTC's investigation and during litigation discovery. Examples of such confidential
 9 information include, but are not limited to, Microsoft's internal decision-making processes, investment
 10 decisions, strategic evaluation of forward-looking opportunities, market share analyses, assessment of
 11 the competitive landscape, business partnerships, terms of existing confidential agreements, revenue
 12 figures and projections, and internal presentations discussing business strategy. Disclosure of this
 13 information would provide Microsoft's competitors with private data about Microsoft's performance
 14 and business strategy, which could harm Microsoft's competitive standing. *See Cont'l Auto. Sys. v.
 15 Avanci, LLC*, No. 19-cv-02520-LHK, 2019 WL 6612012, at *4 (N.D. Cal. Dec. 5, 2019). Thus, the
 16 unsealing of this highly confidential and sensitive information would cause injury to Microsoft that
 17 cannot be avoided through less restrictive alternatives.

18 Finally, Microsoft provided the FTC with the confidential business information contained in
 19 Plaintiff's Reply pursuant to the statutory and regulatory guarantees of confidentiality contained in the
 20 Hart-Scott-Rodino Act or the FTC Act. *See* 15 U.S.C. §§ 18a(h), 46(f), 57b-2(b), 57b-2(c); 6 C.F.R. §
 21 4.10(d)-(g). In similar cases, the FTC has acknowledged the need to maintain the confidentiality of a
 22 party's confidential business information that has been provided to the FTC via a regulatory request.
See, e.g., FTC v. Lockheed Martin Corp., 2022 WL 1446650, at *2 (D.D.C. Jan. 25, 2022) (“According
 23 to the FTC, sealing the complaint is appropriate . . . because the filing includes confidential information
 24 submitted . . . pursuant to ‘statutory and regulatory guarantees of confidentiality.’ . . . The requested
 25 sealing covers only confidential information and is, according to the FTC, required by regulation.”).

26 **III. Conclusion**

27 As stated above, compelling reasons justify Microsoft's request for sealing the confidential
 28

1 business information contained within Plaintiff's Reply. Microsoft therefore respectfully requests that
2 this Court grant the FTC's Motion to Seal (ECF No. 132) as to Microsoft's confidential business
3 information, consistent with the specific recitations stated herein. In accordance with Civil Local Rule
4 7-11, Microsoft has also filed a Proposed Order herewith.

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1 Dated: June 27, 2023

Respectfully submitted,

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3 By: */s/ Beth Wilkinson*

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